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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 443

TITUSVILLE DAIRY PRODUCTS COMPANY,
*Petitioner,*

vs.

CHARLES F. BRANNON, Secretary of Agriculture of the United States,
*Defendant.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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## Opinion Below

The opinion of the United States Circuit Court of Appeals for the Third Circuit, delivered by Judge O'Connell for the Court, is reported in 176 F(2) 332 and also appears in the record of the present proceedings (R 482). The opinion of the Court, entered August 4, 1949, affirms in part and reverses in part the decree entered by the United States District Court for the Western District of Pennsylvania. The opinion of the latter Court is reported in 63 F. Suppl. 104, and appears in the Appendix, in the proceedings before the United States Circuit Court of Appeals for the Third Circuit filed herewith, page 17a.

## Jurisdiction

The order of the Court below, the United States Circuit Court of Appeals for the Third Circuit, was entered August 4, 1949 and amended August 15, 1949 (R 488-489).

The jurisdiction of this Court to issue the writ of certiorari applied for is invoked under Title 28, U. S. Code, Sec. 1254 (1).

## Questions Presented

1. Where a milk handler whose plant is located in Pennsylvania, buys milk only from Pennsylvania producers and sells the same and its products exclusively in Pennsylvania, is such a handler subject to New York Milk Marketing Order No. 27 of the Secretary of Agriculture of the United States, by virtue of the fact that such handler possesses a permit issued by the health authorities of the City of New York for shipment into New York City?

*The District Court answered in the negative.*

*The United States Circuit Court of Appeals for the Third Circuit reversed the District Court and answered the question in the affirmative.*

2. Where a handler whose plant is located in Pennsylvania, buys milk only from Pennsylvania producers, and sells the smaller portion of its cream in New York City, is such dealer subject to New York Milk Marketing Order No. 27 of the Secretary of Agriculture of the United States as to its sales made outside the New York Milk Marketing Area, by virtue of the fact that it possesses a permit issued by the health authorities of the City of New York for shipment into New York City?

*The District Court answered in the affirmative and the United States Circuit Court of Appeals for the Third Circuit affirmed the lower Court on this point.*

**Statutes Involved**

The Agricultural Marketing Agreement Act of 1937, (50 Stat. 246, 7 U. S. C. A. 601 et seq.); and the Milk Control Law of Pa. of April 28, 1937, P.L. 417, 31 P.S. 700j et seq., are the statutes involved. These two statutes have been declared constitutional and their validity is not herein involved. The questions here involved rest solely upon the application of the Agricultural Marketing Agreement Act of 1937. The Secretary of Agriculture, under its authority, issued Milk Marketing Order No. 27 which affects the New York Milk Marketing Area and in Article I, Section 1 thereof, the term "handler" is defined as follows:

> "6. 'Handler' means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, *which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce.* This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment." (Italics added.)

The questions presented bring under consideration this definition of "handler." The position of Petitioner is that during the period of time (October 5, 1941 to January 16, 1942) it shipped no milk or milk products into the New York Milk Marketing Area, it in no way burdened, obstructed, or affected interstate commerce. Petitioner takes the further position that during the time it did ship some cream only to New York City, it did not burden, obstruct or affect interstate commerce so far as its entire operation was concerned, but only in regard to that cream actually shipped into the Marketing Area. This position brings under consideration that part of the definition printed in italics. In this connection it should be pointed out that in the year 1945, Order No. 27 was amended by deleting from the definition that part in italics.

The Marketing Agreement Act of 1937 gives the Secretary authority to promulgate orders affecting milk being shipped in interstate commerce or which burdens, obstructs or affects interstate commerce. The Milk Control Act of Pennsylvania, having been declared constitutional by the Supreme Court of Pennsylvania and by your Honorable Court, as a proper exercise of the Pennsylvania police power in regulating the health of the citizens of Pennsylvania, gives to the Milk Control Commission of Pennsylvania, the authority to regulate the prices milk handlers in Pennsylvania must pay milk producers, and fixes the prices milk handlers must charge Pennsylvania consumers. Your Honorable Court held this power to be justified even though it indirectly affected interstate commerce. (*Milk Control Board* v. *Eisenberg Farms* 306 U. S. 346, 350, 59 S. Ct. 528.)

**Statement**

Petitioner is engaged in the business of buying and selling milk. Its plant is located in Titusville, Pennsylvania.

From October 5, 1941 to January 16, 1942, Petitioner sold no milk and bought no milk outside the Commonwealth of Pennsylvania.

The Secretary of Agriculture attempted to impress upon Petitioner the provisions of Federal Marketing Agreement Order No. 27, which regulates milk shipped to the New York Metropolitan Milk Marketing Area, on the basis that Petitioner had not surrendered, until January 16, 1942, its New York City Health permit which had been in existence for a long period of time.

For the period from July, 1941, to October 5, 1941, Petitioner purchased all its milk from Pennsylvania producers but did ship a small portion of its total receipts to the New York Marketing Area in the form of cream.

The Secretary of Agriculture attempted to impress the provisions of Order No. 27 on Petitioner as to his entire operation during this period of time.

During these two periods of time, Petitioner complied with the Pennsylvania Milk Control Law, of April 28, 1937, P. L. 417, 31 P. S. 700j et seq., by paying the producers the minimum prices established by the Pennsylvania Milk Control Commission for all the milk purchased and sold in Pennsylvania.

During the period from July 1941 to October 5, 1941, Petitioner complied with Federal Order 27 with regard to the milk purchased from Pennsylvania producers which was converted to cream and was shipped to the New York Marketing Area.

Petitioner filed a petition pursuant to the Agricultural Marketing Agreement Act with the Secretary of Agriculture, asking that it be determined that Petitioner was not subject to the provisions of Federal Order No. 27 during either of the aforementioned periods of time except as to the cream shipped to New York during the period of July 1941, to January 16, 1942.

The Secretary denied the Petition. His denial was affirmed by the judicial officer. Petitioner filed an appeal to the United States District Court for the Western District of Pennsylvania from these decisions as is provided by the Agricultural Marketing Agreement Act.

The District Court reversed the Secretary of Agriculture for the period October 5, 1941 to January 16, 1942 when no sales whatsoever were made outside the Commonwealth of Pennsylvania but affirmed the Secretary as to the period of time from July 1941 to October 5, 1941.

The Circuit Court of Appeals for the Third Circuit reversed the United States District Court and held Petitioner to be subject to Federal Order No. 27 during both periods of time, notwithstanding this would permit any milk dealer in Pennsylvania to ignore the Pennsylvania Milk Control Law by merely obtaining a New York health permit without any intention of shipping milk to the New York Marketing Area and, notwithstanding such holding results in a determination of what constitutes or affects interstate commerce in complete disregard of the actual facts concerning the operations made subject to Federal control.

**Basis of Decisions Below**

The United States District Court for the Western District of Pennsylvania based its decision on the fact that inasmuch as no milk was shipped from Pennsylvania to the New York Market from October 5, 1941 to January 16, 1942 and no milk was purchased by Petitioner from without the Commonwealth of Pennsylvania, the operations of Petitioner were obviously not in interstate commerce and did not burden, obstruct or affect interstate commerce. The Court was of the opinion that the mere holding of a health permit, which meant that Petitioner operated its plant under such a sanitary condition and purchased milk which was produced under such sanitary conditions as met New York City health requirements, did not put Petitioner in interstate commerce or in the position of burdening, obstructing, or affecting interstate commerce. The same District Court, however, was of the opinion that during the period of July, 1941 to October 5, 1941, when some cream was shipped to New York City by Petitioner, this was sufficient to declare Petitioner's entire operation as

either being in interstate commerce directly or burdening, obstructing or affecting interstate commerce.

The United States Circuit Court of Appeals for the Third Circuit based its opinion upon the theory that since Petitioner held a New York City health permit and did not ask to have it revoked, it therefore affected interstate commerce because it might have shipped milk to New York City if it could obtain customers; and upon a further fact, that during the time Petitioner was shipping milk into New York City, it had received from the Producers Settlement fund the sum of $55,000.00 for transmission to its shippers or producers. The opinion did not state, nor did the United States Attorney argue that Petitioner in any way benefited by this $55,000.00; nor does it appear in the record anywhere. Petitioner was merely the conduit through which its producers received this amount of money, because the New York blend price was higher than the prices Petitioner was required to pay for the uses to which it put its milk The Circuit Court cites *Nebbia* v. *New York,* 219 U. S. 502, and *U. S.* v. *Rock Royal Co-Operative,* 307 U. S. 533, as justification for the interpretation of the Secretary of Order 27 in this case. These two cases offer no authority for such an interpretation. The first case has to do with a New York State Milk Control Law. The second case has to do with milk being shipped into the Milk Marketing Area.

**Specification of Errors to Be Urged**

1. The United States Circuit Court of Appeals for the Third Circuit erred in holding that where Petitioner held a health permit issued by the City of New York, its operation affected interstate commerce and was therefore subject to Federal Order No. 27, even though no milk was bought or sold without the Commonwealth of Pennsylvania.

2. The United States Circuit Court of Appeals for the Third Circuit erred in holding, in effect, that the health authorities of the City of New York could determine what

milk handlers did or did not burden, obstruct or affect interstate commerce.

3. The United States Circuit Court of Appeals for the Third Circuit erred in holding, in effect, that, regardless of where milk was purchased or sold, it would affect interstate commerce if the handler held a New York City health permit; but it would not affect interstate commerce even though it was shipped across the state line without the benefit of a health permit.

4. The United States Circuit Court of Appeals for the Third Circuit erred in holding that, if a small portion of a handler's milk, bought wholly within the Commonwealth of Pennsylvania, was manufactured into cream and shipped to New York City, the handler's entire operation of receiving whole milk from producers patronizing it and selling it to consumers all within the Commonwealth of Pennsylvania was burdening, obstructing or affecting interstate commerce.

**Reasons for Granting the Petition**

1. The United States Circuit Court of Appeals for the Third Circuit has decided a Federal question in a way which conflicts with applicable decisions of your Honorable Court in that it held that the mere holding of a New York City health permit places the holder thereof in the position of burdening, obstructing or affecting interstate commerce, regardless of the manner of his actual operation.

This is in conflict with the decisions of your Honorable Court to the effect that the actual facts concerning the operation determine what does and what does not affect interstate commerce. *Chassaniol* v. *City of Greenville*, 291 U. S. 584; *Carter* v. *Carter Coal Company*, 298 U. S. 238.

2. The United States Circuit Court of Appeals for the Third Circuit by its decision has given validity to the act of a Federal agency in delegating strictly Federal powers

to an official of a State or some sub-division thereof. The legislative power, to some degree, may be delegated to some proper Federal officials, but it can not be delegated to the officials of a state or some sub-division thereof. RE Rahrer, 140 U. S. 545, 546.

3. The United States Circuit Court of Appeals for the Third Circuit has made it possible for any milk handlers located in Pennsylvania, to ignore the Pennsylvania Milk Control Law by merely obtaining a New York health permit, without any intention of shipping milk into New York, but for the purpose merely of evading the Pennsylvania statute. This would frustrate the purposes for which the Pennsylvania Milk Control Law was passed, which purposes have been held proper and valid by your Honorable Court. This procedure would nullify the decision in the case of *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346. This is so because if the Federal Order has jurisdiction, the State Milk Control Law and the Orders issued thereunder have no jurisdiction. This could mean a complete negation of the Pennsylvania Milk Control Law, a health law enacted by the Pennsylvania Legislature in the proper exercise of police power for the benefit and protection of the health of the citizens of Pennsylvania.

4. The United States Circuit Court of Appeals for the Third Circuit has, by its opinion, announced a theory of interstate commerce law in complete conflict with the decisions of your Honorable Court, in that it does not require a reasonable classification to be made by an administrative officer, the effect of which is to completely destroy intrastate commerce in the field of milk, and its regulation by the states. *Manhatten G. E. Co.* v. *Commissioner of Internal Revenue,* 297 U. S. 129.

Wherefore, Petitioner prays that a Writ of Certiorari be issued out of and under the seal of the Supreme Court of the United States, directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that

Court to certify the records and the cases herein to the Supreme Court of the United States for its review and determination.

Respectfully submitted,

WILLIS F. DANIELS,
ELMER E. HARTER, JR.,
GEORGE H. HAFER,
*Attorneys for Petitioner.*

STATE OF PENNSYLVANIA,

*County of Dauphin, ss:*

Willis F. Daniels, being duly sworn according to law, deposes and says that he is counsel for Petitioner herein; that he has read the within petition and knows the contents thereof, and that the allegations in the said Petition are true to the best of his knowledge, information and belief.

WILLIS F. DANIELS.

Sworn to and subscribed before me this 28th day of October, 1949.

CLAIRE FORTENBAUGH,
[ SEAL. ] *Notary Public.*

**Certificate of Counsel**

We hereby certify that the foregoing petition is, in our opinion, well founded and entitled to the favorable consideration of the Supreme Court of the United States, and that it is not filed for the purpose of delay.

WILLIS F. DANIELS,
ELMER E. HARTER, JR.,
GEORGE H. HAFER,
*Attorneys for Petitioner.*

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

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No.

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TITUSVILLE DAIRY PRODUCTS COMPANY,
*Petitioner,*

vs.

CHARLES F. BRANNON, Secretary of Agriculture of the United States,
*Defendant.*

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## BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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### Specifications of Error

The United States Circuit Court of Appeals for the Third Circuit erred in the following respects:

1. The United States Circiut Court of Appeals for the Third Circuit erred in holding that where Petitioner held a health permit issued by the City of New York, its operation affected interstate commerce and was therefore subject to Federal Order No. 27, even though no milk was bought or sold without the Commonwealth of Pennsylvania.

2. The United States Circuit Court of Appeals for the Third Circuit erred in holding, in effect, that the health

authorities of the City of New York could determine what milk handlers did or did not burden, obstruct or affect interstate commerce.

3. The United States Circuit Court of Appeals for the Third Circuit erred in holding, in effect, that, regardless of where milk was purchased or sold, it would affect interstate commerce if the handler held a New York City health permit, but it would not affect interstate commerce even though it was shipped across the state line without the benefit of a health permit.

4. The United States Circuit Court of Appeals for the Third Circuit erred in holding that, if a small portion of a handler's milk, bought wholly within the Commonwealth of Pennsylvania was manufactured into cream and shipped to New York City, the handler's entire operation of receiving whole milk from producers patronizing it and selling it to consumers all within the Commonwealth of Pennsylvania was burdening, obstructing or affecting interstate commerce.

## ARGUMENT

1. Petitioner, from October 5, 1941 to January 16, 1942, bought and sold all its milk within the State of Pennsylvania, and did not directly burden, obstruct or affect interstate commerce merely because it held a health permit indicating its plant satisfied the health requirements of New York City. The Agricultural Marketing Agreement Act of 1937 (7 USCA 601 et seq.), was enacted as an economic measure under the power of Congress to regulate commerce between states, but, it cannot be interpreted broadly enough to grant the Secretary of Agriculture the authority to bring within his jurisdiction, by means of a Federal marketing agreement order, a milk handler located in Pennsylvania who buys and sells all his milk within the Commonwealth of Pennsylvania, merely because the handler holds a New York City health permit. When the Congress delegates to an administrative official the power to carry into execution

certain powers granted him by the Congress that authority must be exercised in a reasonable manner. The rule of reason governing administrative officers, is found in the case of *Manhattan G. E. Company* v. *Commissioner of Internal Revenue,* 297 U. S. 129;

> ". . . and not only must a regulation in order to be valid be consistent with the statute, but it must be reasonable."

It is perfectly obvious that before an intrastate operation can directly affect, burden or obstruct interstate commerce, there must be something more than a mere intention on the part of someone to ship either in interstate commerce or in a manner to burden, obstruct, or affect interstate commerce. *Carter* v. *Carter Coal Company,* 298 U. S. 230;

> "That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the Commerce Clause."

In this case, we do not find anything to indicate that there even existed an intention to ship milk into the marketing area but find only a plant that was operated under such sanitary conditions as would permit it to ship milk into the City of New York.

A long line of cases holds that production and manufacturing are not interstate commerce and the activities of those industries thus engaged do not affect interstate commerce except incidentally or remotely. Their business is therefore not subject to regulation by the federal government.

*United Mine Workers* v. *Coronada Coal Company,* 259 U. S. 407, 66 L. ed. 975

*Oliver Iron Mining Company* v. *Lord,* 262 U. S. 172, 67 L. ed. 929

*Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. ed. 23

*Hope Natural Gas Company* v. *Hall*, 274 U. S. 284, 71 L. ed. 1049

*Foster Fountain Packing Company* v. *Haydel*, 278 U. S. 1, 73 L. ed. 147

*Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, 76 L. ed. 1038

*Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346

*Champlain Rfg. Co.* v. *Corporation Commission*, 286 U. S. 210, 76 L. ed. 1062

The business of buying and selling cotton locally produced, processed and warehoused is local in character and the local occupation tax was held not to contravene the Commerce Clause although the course of business was such that all of the cotton so bought was ultimately shipped by the buyer in interstate commerce. *Chassaniol* v. *City of Greenwood*, 291 U. S. 584 (1934).

Petitioner in this case bought milk from October 5, 1941 to January 16, 1942 which was produced in the Commonwealth of Pennsylvania and sold in the Commonwealth of Pennsylvania. Production and sales were in the Western part of Pennsylvania and moved in that direction and not in the direction of New York City.

Under the decisions of your Honorable Court, this could not be construed to directly affect, burden or obstruct interstate commerce.

The Secretary of Agriculture took jurisdiction over Petitioner for this period of time on the sole basis that Petitioner held a New York City health permit. The use of this test although convenient is far short of the proper exercise of the administrator's authority. To hold that the possession of the health permit burdened or directly affected interstate commerce when no milk or milk products were shipped into the area is drawing the reasonable relationship between the object to be accomplished and the methods

used for that purpose to such a fine line that the breaking point is reached and an absurdity results.

The Secretary himself, recognized that something more was required before a milk dealer or handler should be considered as being subject to his Orders, for the definition of a handler found in Article I, Sec. 1 of Order No. 27 reads as follows:

> "6. 'Handler' means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, *which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce.* This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment." (Italics added.)

It will therefore be noted that the definition provides that not only must the handler hold the health permit, but the handling must be either in the current of interstate commerce or directly affecting, burdening or obstructing interstate commerce. This definition was in force during the time involved in this case, but that part of the definition found in italics was subsequently by way of amendment stricken out. The definition as amended eliminated one of the requirements but this elimination was not in effect until after the time involved in this case.

The Secretary, however, is attempting to interpret the definition as it existed during the period here in question as though it were written as it existed subsequent to the time here involved. The striking from the definition these words can not be considered as an idle gesture, nor can the words as they appeared in the original definition be

surplusage and of no effect, nor can the Secretary give a retroactive effect to the definition as it was promulgated subsequent to the time here involved. *Genesco* v. *Walling*, 324 U. S. 244, 265; *Russell* v. *United States*, 278 U. S. 181; *Crawford on Statutory Construction*, Sect. 200; *Sutherland on Statutes and Statutory Construction*, 3rd edition, Sect. 4926. It is held in the above case and stated by the above authorities that words should not be considered surplusage and without meaning nor ignored unless no other construction can be given the entire context.

If it were to be assumed that the Secretary's definition as above quoted made an intrastate transaction subject to federal jurisdiction on the ground that it directly burdens, affects or obstructs interstate commerce merely because the person involved holds a health permit granted by an official of a state or sub-division thereof, then such action would be illegal because Congress can not transfer its legislative powers to a state. *Re Rahrer*, 140 U. S. 545, 560.

2. The opinion of the United States Circuit Court of Appeals for the Third Circuit nullifies the Pennsylvania Milk Control Law. The Pennsylvania Milk Control Law established in the Commonwealth of Pennsylvania, the Milk Control Commission with powers to fix the prices milk handlers must pay their producers and the prices handlers are to charge consumers. This statute was enacted primarily for the benefit of the health of the citizens of the Commonwealth of Pennsylvania and has been held by the Pennsylvania Supreme Court in a number of cases to be constitutional. *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A. 336, (1936); *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 332 Pa. 15, 1 A (2d) 775. Your Honorable Court also held the statute constitutional in the case of *Eisenberg Farm Prod.* v. *Milk Control Board*, 332 Pa. 34, 200 A. 854. It was held in the cases above cited and in others since decided that the Pennsylvania statute was a proper exercise of the police power and was dealing with a

local condition and therefore could properly incidentally burden or affect interstate commerce.

If the United States Circuit Court of Appeals' decision is a correct pronouncement of the law, any dealer in Pennsylvania, wishing to avoid the obligations impressed upon him by virtue of the Pennsylvania statute with regard to the prices he pays producers, could do so by merely obtaining a New York City health permit. This would be highly desirable by him because the price to be paid to producers as fixed by the Secretary of Agriculture is lower than the price fixed by the Milk Control Commission of Pennsylvania to be paid to producers. This would obviously negate and completely frustrate the objects of the Pennsylvania statute and would in no wise carry out the objects of the Agricultural Marketing Act.

Our federal system requires that there be a distinction between what is national and what is local. *National Labor Relations Board* v. *Jones and Laughlin Steel Company,* 301 U. S. 1 (1937); *U. S.* v. *Rock Royal Co-Operative,* 307 U. S. 533, 83 L. ed. 1446. The preceding cases relied upon by the government in the lower courts all dealt with the situation where the milk was actually shipped from the plant involved, into the milk marketing area. This is not the situation in the case now before your Honorable Court from October 5, 1941 to January 16, 1942.

Petitioner, from July 19, 1941 to October 5, 1941 did ship some cream into the City of New York. It is contended, however, that only that milk from which the cream was derived was subject to Federal Order No. 27, and Petitioner did comply with the order to that extent. The reasoning heretofore set forth will apply to the milk bought and sold in Pennsylvania during this period of time.

## Conclusion

It is therefore respectfully submitted that the United States Circuit Court of Appeals for the Third Circuit erred

in its order and that a Writ of Certiorari should issue to it in order that the questions hereby presented by it may be reviewed by the Supreme Court of the United States.

Respectfully submitted,

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*Attorneys for Petitioner.*

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## CITATIONS


Cases:

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*Carter* v. *Carter Coal Co.*, 298 U. S. 238 — 16

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*Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605 — 17

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# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 443

TITUSVILLE DAIRY PRODUCTS COMPANY, PETITIONER

*v.*

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court is reported[1] in 77 F. Supp. 232. The opinion of the United

[1] The opinion of the District Court also appears (R. 17–26) in what the petitioner refers to (Pet. 2) as the "record of the present proceedings" which accompanied the petition for a writ of certiorari. This "record" referred to by the petitioner is merely the appendix to the brief for the Secretary of Agriculture in this case in the United States Court of Appeals for the Third Circuit, plus the opinion and judgment of the Court of Appeals. Although the appendix to the Secretary's brief in the Court of Appeals did not include or constitute the entire record in the case, our references herein to the appendix are indicated as being to the record.

States Court of Appeals for the Third Circuit (R. 482–488), as amended (R. 489), is reported in 176 F. 2d 332.

### JURISDICTION

The judgment of the Court of Appeals was entered August 4, 1949 (R. 488–489). The petition for a writ of certiorari was filed on November 1, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTION PRESENTED

Whether under Department of Agriculture Order No. 27 (the New York Milk Order), issued pursuant to the Agricultural Marketing Agreement Act of 1937, the petitioner's surplus milk approved by the health authorities for marketing in New York City is subject to regulation, irrespective of actual shipment of such milk in interstate commerce.

### STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended.

The order involved is Federal Order No. 27, regulating the handling of milk in the New York metropolitan marketing area. It was issued on August 5, 1938, effective September 1, 1938 (3 F. R. 1945, 1957, 2100, 2102; 7 CFR, 1938 Supp.,

927). It was suspended (4 F. R. 1259, 2377) during the period January 31, 1939, to July 1, 1939.[2] The order, as amended and reissued with amendments from time to time, is now in effect (7 CFR, 927.1). The order is not printed in the record but its pertinent parts are quoted or summarized in this brief. The method of determining the uniform price under the order and the operation of the producer-settlement fund or equalization pool are described in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, sustaining the validity of the Act and the order.

## STATEMENT

The petitioner, Titusville Dairy Products Co. ("Titusville"), operated at all times between September 1, 1938 and January 16, 1942, a plant at Titusville, Pennsylvania, where it processed and distributed milk received from producers in Pennsylvania. At some time prior to September 1, 1938, Titusville had applied for and received from the New York City Health Department approval as a plant from which milk might be shipped into New York City for consumption and distribution, and it retained this approval during the entire period in question. (R. 21.) During the period between September 1, 1938 and October 5, 1941, the petitioner shipped substantial

[2] The suspension was in connection with the litigation which culminated in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

quantities of milk or cream into the New York Milk Marketing Area (the "Area") and sold its surplus milk to customers in Pennsylvania.[3] (R. 21–23.)

On September 1, 1938, Department of Agriculture Order No. 27, governing the milk industry in the Area and designed to insure the payment by handlers of a uniform price to producers, became effective. (R. 21–22.) The Order, the purpose and operation of which are described in detail in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (which sustained the validity of the Act and the Order), established a producer-settlement fund to equalize the cost of milk to handlers and provided for administrative assessments. It defined a "handler" as "any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce. * * *" (R. 21–22.)[4] From Sep-

[3] "Surplus" milk, under the scheme of the Order, is that which is surplus to the requirements of the New York Area for fluid milk or cream. Such milk might be sold elsewhere as fluid milk or cream or be made into milk products (butter, cheese, etc.) for sale in the New York Area or elsewhere.

[4] Prior to May 1, 1940, the Order further provided that "This definition shall not be deemed to include any person who neither received milk from producers nor handles milk which is sold as milk or cream in the marketing area." By amendment of that date, this sentence was deleted. (R. 22.)

tember 1, 1938, to July 1, 1941, the petitioner recognized that its handling of milk at the Titusville plant was subject to the Order. During that period it paid the administrative assessments to the Market Administrator on milk received at its plant, submitted detailed reports as a handler in connection with the classification and pricing of milk under the Order, and received $55,213.25 from the producer-settlement or equalization pool.[5] (R. 22.)

After October 5, 1941, the petitioner shipped no milk or cream into the Area, but gave no notice to this effect to any official body. On November 22, 1941, the petitioner wrote the Market Administrator, asking as to the procedure for withdrawal from the New York milk pool, and the Administrator on November 25 replied (R. 271) that the procedure was to relinquish the approval of its plant by the New York City Board of Health. More than a month later, on January 13, 1942, the petitioner requested the New York City Board of Health to cancel the approval of its plant. The Board did as requested on Jan-

[5] Prior to March 1, 1941, the petitioner was subject to the provisions of the Order only to the extent that it shipped fluid milk or cream into the area. On that date, however, the Order was so amended that all milk received at a "handler's" plant was priced and pooled under the Order, regardless of where sold. See fn. 8, pp. 11-12, *infra*. Under this amendment, Titusville, which shipped into the Area less than half the milk received at its plant, became a contributor to, rather than a recipient from, the producer-settlement fund. (R. 23–24, 483–484.)

uary 16 (R. 281), and the Administrator immediately recognized the cancellation as ending the petitioner's status as a "handler" under Order No. 27.

The petitioner did not pay any sums into the producer-settlement fund after July 1, 1941, although it continued to ship substantial quantities of cream into the New York Area until October 5 (R. 22–23, 50–51) and filed reports as a handler under the Order until January 16, 1942, which reports indicated that it owed money to the fund (R. 23, 51).

This proceeding was initiated by the filing of a petition under § 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 608c (15) (A)), requesting the Secretary of Agriculture to hold a hearing on the claims of petitioner and to reverse the action of the Market Administrator in deciding that all of the petitioner's milk was subject to regulation during the period in controversy. (R. 33–47.) This section of the Act provides for a hearing on any petition filed by a handler with respect to an order or obligation thereunder which the handler asserts is "not in accordance with law." *United States* v. *Ruzicka,* 329 U. S. 287. The ruling of the Judicial Officer[6] on the petition is "final, if in ac-

[6] The Judicial Officer acted for the Secretary of Agriculture of the United States pursuant to the authority delegated (10 F. R. 13769) under the Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. 516a *et seq.*, which provides that whenever a

cordance with law" (7 U. S. C. 608c (15) (A)). Jurisdiction is conferred on the district courts to review a ruling of the Judicial Officer upon the institution of such action by the handler.

The Judicial Officer, holding that the petitioner was a handler and that all of its milk was subject to regulation during the entire period in controversy, dismissed the petition. (R. 60.) The District Court affirmed the decision of the Judicial Officer that the petitioner was subject to regulation as a handler with respect to all of its marketing of milk during the period July 1, 1941, to October 5, 1941, but, holding that the petitioner was not a handler with respect to any of its marketing transactions during the period October 5, 1941, to January 16, 1942, reversed the ruling with respect to that part of the period in controversy. (R. 17–28.) The United States Court of Appeals for the Third Circuit reversed the District Court and affirmed the decision of the Judicial Officer by holding that the petitioner was subject to regulation, under the order, with respect to all of its marketings of milk until the petitioner's plant on January 16, 1942, ceased to be an approved source of supply for New York City. (R. 482–489.)

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delegation is made under the statute "all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture."

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ARGUMENT

The court below correctly determined that Titusville was a "handler" within the scope of Order No. 27 so long as it retained the approval which it had secured from the New York health authorities and so remained an eligible and potential seller of fluid milk in the Area; and that the Order as so construed did not exceed the Secretary's authority, even though some of the petitioner's milk was surplus to the requirements of the Area prior to October 5, and all of it was surplus thereafter. (R. 485–488.)

This Court has heretofore recognized that adequate stabilization of the milk market in the New York Marketing Area requires regulation not only of that milk which is actually sold there as fluid milk or cream, but also of "surplus" milk—*i. e.*, that milk which is handled by suppliers approved for distribution in the Area but which, being surplus to the actual demand of the Area for fluid milk, must either be sold elsewhere as fluid milk or processed into milk products.[7]

[7] The Court stated in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 549–550: "The problems concerned with the maintenance and distribution of an adequate supply of milk in metropolitan centers are well understood by producers and handlers. In the milkshed and marketing area of metropolitan New York these problems are peculiarly acute. It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of

*United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533; *Nebbia* v. *New York*, 291 U. S. 502. The chief cause of disorderly marketing is the

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demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. The sale of milk in metropolitan New York is ringed around with requirements of the health departments to assure the purity of the supply. Only farms with equipment approved by the health authorities of the marketing area and operated in accordance with their requirements are permitted to market their milk. * * * Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. It is obvious that the marketing of fluid milk in New York has contacts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condition for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, cut-throat competition even among them would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act."

existence of the surplus milk (*United States* v. *Rock Royal Co-operative, Inc., supra,* at 307 U. S. 549); so long as the surplus burden "is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor." *Nebbia* v. *New York, supra,* at 291 U. S. at 518.

The Order in question regulates the handling of all milk which may, because handled by a plant having the approval of the health authorities, be sold in the Area; the definitions of "producer" and "handler" identify the milk and the persons to be regulated. This Court in *United States* v. *Rock Royal Co-operative, Inc., supra,* described the ambit of the Order as follows (307 U. S. at 554):

> By the Order the marketing area is defined as the City of New York and the counties of Nassau, Suffolk and Westchester. A producer is any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area. A handler is a person engaged in the handling of milk or cream received at an approved plant for similar sale. * * *

The economic necessity for regulating all of the milk received from producers at plants having health department approval for receiving milk for sale in the New York metropolitan marketing area is apparent from the uncontroverted facts. Any of the milk at such a plant is in economic

competition with all other milk at similar plants. There is complete homogeneity of the entire supply of milk approved by the health authorities for sale in fluid form in the marketing area. The economic considerations and the health or sanitary requirements are, in this respect, inextricably interlaced. The approval of the milk plants by the health authorities "as a condition for the sale of * * * fluid milk in the metropolitan area, isolates from * * * general competition a well-recognized segment of the entire industry." *United States* v. *Rock Royal Co-operative, Inc., supra,* at 307 U. S. 550.

If the Order were restricted, as the petitioner contends (Pet. 4) it should be restricted, to the milk or cream actually shipped to the marketing area, the acute problem as to the surplus milk would remain unresolved. Only by making the Order apply to all of the approved milk, including the surplus milk, could the Secretary, on the basis of the evidence, conclude under § 8c (4) and § 8c (18) of the Act that the Order would achieve the economic goal set forth in the statute. The delimitation of the scope of the order is based on the evidence in the hearing record, evidence which, insofar as it relates to the issues in this case, is not only substantial but almost entirely uncontroverted.[8]

[8] The petition and brief in support thereof do not refer to any evidence in the record in support of the petitioner's con-

As to the channels of commerce in milk for the marketing area, the Secretary found (3 F. R. 1946):

> That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing

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tention that its surplus milk should be free from regulation. The petitioner fails to assert an absence of substantial evidence to support the Order. Moreover, the immediate and increasing need for regulating the surplus milk, as well as the milk disposed of on the fluid milk market, in the marketing area, became so pronounced that the order was amended (5 F. R. 4970, 6 F. R. 1181) effective March 1, 1941, on the basis of evidence (e. g., R. 467–472) at the amendment hearing, so as to provide that all milk received at an approved plant is priced under the order regardless of whether the milk is disposed of in the marketing area, or outside the marketing area, for fluid use or as surplus milk for manufacturing purposes. Prior to that amendment all of the milk was regulated in some respects, but not in all respects.

area; and that *all milk which is produced for sale in the marketing area is handled in the current of interstate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and its products.* [Emphasis supplied.]

The record shows (R. 365) that approximately 17% of the milk sold in the marketing area comes from Pennsylvania.

The definition of "handler," as set forth in the Order, includes[9] any person who engages in the handling of milk or cream therefrom, "which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce."[10]

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[9] The petitioner was unequivocal, at the hearing on its petition, that (R. 193): "There is no question about what the order purports to regulate. We quite agree that the order, as written, attempts to regulate all the milk that flows through the plant that has a New York City or New York State health permit, regardless of where the milk is purchased or where the milk is sold. * * * We are not questioning what the order says."

[10] Plant approval is not thrust on any handler. The handler voluntarily applies for and maintains approval by the health department and may voluntarily obtain the cancellation of the approval at any time. The petitioner's status as an approved plant was promptly cancelled on its request for cancellation (R. 281). The reference, in the definition of handler in the order, to health department approval thus merely specifies that milk which is in the channel of commerce to be regulated under this marketing order; there is no delegation of legislative power to the local health authorities.

The proposed Order on which the original promulgation hearing was held contained a definition of "handler" which set forth two conditions, *i. e.,* a person who receives and disposes of milk at a plant approved by any health authority for the shipment of milk to the marketing area, *and* "who engages in such handling of milk or cream as is in the current of interstate commerce" (R. 412–413). On the basis of the evidence at the hearing on the proposed program, the definition of "handler" was revised so as to omit the conjunction and thereby eliminate the second condition. As revised, the definition of "handler" refers only to plants approved by any health authority, and then states that the handling of milk in any such plant is in interstate commerce or directly affects, burdens, or obstructs interstate commerce. The definition of handler containing only one condition is, therefore, in accord with the finding of fact by the Secretary that all milk, including the surplus milk, which is eligible for sale in the marketing area is handled in the current of interestate commerce or so as directly to burden, obstruct, or affect interstate commerce in milk and milk products. As the court below put it, the proposed Order was rephrased "so as to make the second item merely explanatory of the first; for it was felt that, wherever [health] departmental approval was had, of necessity the milk was in the current of interstate commerce or that in any event interstate commerce was af-

fected." (R. 487.) Assuming, *arguendo,* that the definition of handler states two conditions, *i. e.,* plant approval *and* handling that is in interstate commerce or directly affects such commerce, there is nothing in the record inconsistent with the Secretary's conclusion that the marketing of surplus milk, approved by the health authorities for sale in the marketing area, is in interstate commerce or directly affects such commerce. The evidence in support of the Secretary's conclusion is abundant (*e. g.,* R. 305–319; 357–358; 430–431).

The questions presented (Pet. 2–3) by the petitioner have been settled by this Court. The statute confers on the Secretary "the full reach of the commerce power" under the Federal Constitution. *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110, 123. The language of the statute and the provisions of Order No. 27 are to be given the full scope of their constitutional counterpart; and all milk, including surplus milk, approved by the health authorities for sale in the marketing area is in interstate commerce or directly affects, burdens, or obstructs interstate commerce. *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533.

There is no merit in the petitioner's assertion (Pet. 8) that the decision below is in conflict with *Chassaniol* v. *City of Greenwood,* 291 U. S. 584, which held that the commerce clause of the Federal Constitution did not prevent a state from

levying an occupational tax on the brokerage of cotton which was ultimately shipped in interstate commerce. Liability to state taxation is no indication of immunity from Federal regulation under the commerce clause. *Stafford* v. *Wallace,* 258 U. S. 495, 525–527; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311. The petitioner also contends (Pet. 8) that the decision below conflicts with *Carter* v. *Carter Coal Co.,* 298 U. S. 238, because "the actual facts" concerning transactions in commerce "determine what does and what does not affect interstate commerce." The instant case certainly presents no conflict with this undisputed principle. The actual facts were considered and analyzed at a protracted public hearing on the proposed program to regulate the handling of milk in the marketing area; the issues have been considered again at hearings on amendments; and the petitioner does not question the adequacy of evidence to support the Secretary's findings of fact that the regulation of all milk, including surplus milk, approved for the marketing area is necessary to effectuate the purpose of the Act.

The petitioner also asserts (Pet. 9) that the decision below conflicts with the decision in *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346. That case deals with a different situation. As explained by the Court (306 U. S. 346, 351), the question there presented was "whether, *in the absence of federal regulation,* the enforce-

ment of the [State] statute is prohibited by Article I, § 8 of the Constitution" (emphasis supplied). Here there was no absence of Federal regulation. Moreover, the petitioner refers to nothing—and there is nothing—in the record to show any conflict between the state and federal regulation of milk marketing. But even if there were, the Federal regulation would prevail. *Minnesota Rate Cases,* 230 U. S. 352, 398–433; *Napier* v. *Atlantic Coast Line Railroad Co.,* 272 U. S. 605; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Hill* v. *Florida,* 325 U. S. 538; *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767; *Rice* v. *Sante Fe Elevator Corporation,* 331 U. S. 218.

## CONCLUSION

The decision of the court below is correct and is not in conflict with any decision of this Court or any other court of appeals. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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